

(2) A description of the petitioner's interest in the property, supported by the documentation, bills of sale, contracts, mortgages, or other satisfactory documentary evidence; and

(3) A statement of the facts and circumstances relied upon by the petitioner to justify expedited return of the seized property, supported by satisfactory evidence.

[T.D. 89-86, 54 FR 37602, Sept. 11, 1989; 54 FR 41364, Oct. 6, 1989; T.D. 99-27, 64 FR 13676, Mar. 22, 1999]

§ 171.53 Ruling on petition for expedited procedures.

(a) *Final administrative determination.* Upon receipt of a petition filed pursuant to § 171.52, Customs shall determine first whether a final administrative determination of the case can be made within 21 days of the seizure. If such a final administrative determination is made within 21 days, no further action need be taken under this subpart.

(b) *Determination within 20 days.* If no such final administrative determination is made within 21 days of the seizure, Customs shall within 20 days after the receipt of the petition make a determination as follows:

(1) If Customs determines that the factors listed in § 171.52(c) have been established, it shall terminate the administrative proceedings and release the property from seizure, or in the case of a commercial fishing industry vessel for which a summons has been issued, but not yet answered, dismiss the summons. The property shall not be returned if it is evidence of a violation of law.

(2) If Customs determines that the factors listed in § 171.52(c) have not been established, it shall proceed with the administrative forfeiture.

[T.D. 89-86, 54 FR 37602, Sept. 11, 1989]

§ 171.54 Substitute res in an administrative forfeiture action.

(a) *Substitute res.* Where property is seized for administrative forfeiture for a violation involving controlled substances in personal use quantities, the owner or interested party may offer to post an amount equal to the appraised value of the property (the res) to obtain release of the property. The offer, which may be tendered at any time

subsequent to seizure and up until the completion of administrative forfeiture proceedings, must be in the form of cash, irrevocable letter of credit, certified funds such as a certified check, traveler's check(s), or money order made payable to U.S. Customs. Unless the property is evidence of a violation of law or has other characteristics that particularly suit it for use in illegal activities, it will be released to the owner or interested party subsequent to tender of the substitute res.

(b) *Forfeiture of res.* If a substitute res is posted and it is determined that the property should be administratively forfeited, the res will be forfeited in lieu of the property.

[T.D. 89-86, 54 FR 37602, Sept. 11, 1989]

§ 171.55 Notice provisions.

(a) *Special notice provision.* At the time of seizure of property defined in § 171.51, written notice must be provided to the possessor of the property regarding applicable statutes and Federal regulations including the procedures established for the filing of a petition for expedited procedures as set forth in section 6079 of the Anti-Drug Abuse Act of 1988 and implementing regulations.

(b) *Notice provision.* The notice as required by section 1607 of Title 19, United States Code and applicable regulations shall be made at the earliest practicable opportunity after determining ownership of, or interest in, the seized property and shall include a statement of the applicable law under which the property is seized and a statement of the circumstances of the seizure sufficiently precise to enable an owner or interested party to identify the date, place and use or acquisition which makes the property subject to forfeiture.

[T.D. 89-86, 54 FR 37602, Sept. 11, 1989; 54 FR 43424, Oct. 25, 1989]

APPENDIX A TO PART 171—GUIDELINES FOR DISPOSITION OF VIOLATIONS OF 19 U.S.C. 1497

Liabilities incurred under section 497, Tariff Act of 1930 (19 U.S.C. 1497), shall be mitigated or remitted in accordance with the following guidelines (see also part 148, Customs Regulations):

I. Violations Involving Dutiable Articles. For violations involving articles subject to duty and for which there is no applicable exemption from duty, the following rules apply:

1. *Mitigated Penalty for First Offense.* For violations which are the first offense, where there is knowledge of the declaration requirements, and where the undeclared articles are discovered by the Customs officers, the liabilities shall be remitted upon payment of Three Times the Duty (but not less than \$50), or the domestic value, whichever is lower.

2. *Mitigating Factors.* When one or more of the following mitigating factors are present, the deciding officer may, within his discretion, remit the liabilities upon payment of Between One and One-Half and Three Times the Duty or the domestic value, whichever is lower:

a. Communications with the violator are impaired because of language barrier, mental condition, or physical ailment;

b. Violator cooperates with Customs officers after discovery of the violation by providing additional information which facilitates conclusion of the case;

c. Violator is an inexperienced traveler;

d. There is contributory Customs error (for example, violator demonstrates he was given incorrect advice by a Customs officer).

3. *Aggravating Factors.* When one or more of the following aggravating factors are present, the deciding officer may, within his discretion, remit the liabilities upon payment of Between Three and Six Times the Duty (but not less than \$100), or the domestic value, whichever is lower:

a. Documentary or other evidence discovered establishes violator's intent;

b. Informant provides information which tends to establish violator's intent and leads to discovery of the violation after the violator has been given an opportunity to properly declare;

c. Violator is an experienced traveler;

d. Undeclared articles are concealed to evade U.S. law;

e. There is behavior, including extreme lack of cooperation, verbal or physical abuse, or attempted escape, which tends to demonstrate a lack of respect for law and authority.

4. *Commercial Articles.* When the undeclared articles are brought in for commercial purposes, the liabilities shall be remitted upon the payment of Six Times the Duty (but not less than \$100), or the domestic value, whichever is lower. Mitigating factors may be used to lower this amount to as little as Three Times the Duty; aggravating factors may be used to increase this amount up to Eight Times the Duty.

5. *Extraordinary Mitigating Factor.*

a. When an individual who has been cleared through Customs without discovery of any undeclared article returns to the examina-

tion area and declares that article, the deciding officer may, within his discretion, remit the liabilities upon payment of One Times the Duty.

b. An individual who declares articles some time later (hours, days, weeks, etc.) may be treated similarly.

6. *Extraordinary Aggravating Factors.*

a. When the offense is a second or subsequent violation, the deciding officer may, within his discretion, remit the liabilities upon payment of Between Six and Eight Times the Duty (but not less than \$250), or the domestic value, whichever is lower.

b. When the offense is a second or subsequent violation, and there are aggravating factors present, generally there shall either be a denial of relief or mitigation to No Less Than Eight Times the Duty or the domestic value, whichever is lower.

c. When there is evidence of an ongoing scheme to defraud the revenue involving multiple entries without declaration of articles subject to declaration, the deciding officer shall act in accordance with the preceding paragraph.

II. Violations Involving Absolutely or Conditionally Free Articles. For violations involving articles either entitled to entry free of duty absolutely (classifiable under a duty-free provision in Chapters 1–97, Harmonized Tariff Schedule of the United States (HTSUS); (19 U.S.C. 1202)), or entry free of duty conditionally (entitled to treatment under the Generalized System of Preferences (see §§10.171–10.178, Customs Regulations) or Chapter 98, HTSUS), the following rules apply:

1. *Mitigated Penalty for First Offense.*

a. For violations which are first offense, and involve articles entitled to the benefit of GSP or Chapter 98, HTSUS, the liabilities shall be remitted upon payment of One Times the Duty which would have been due if the articles had not been entitled to the benefit.

b. For violations which are first offense, and involve absolutely duty-free articles, the liabilities shall be remitted upon payment of Between One and Five Percent of the Domestic Value, but not less than \$50 (or the domestic value, whichever is less) nor more than \$1,000.

2. *Mitigating Factors.* When mitigating factors such as those outlined above are present, the deciding officer may, in his discretion, reduce the mitigated amount to a lower figure.

3. *Aggravating Factors.*

a. When aggravating factors such as those outlined above are present, the deciding officer may, in his discretion, remit the liabilities for conditionally free articles upon the payment of Between One and Two Times the Duty (but not less than \$100), or the domestic value, whichever is lower.

b. For absolutely free articles, the deciding officer may remit the liabilities upon payment of Between Five and Ten Percent of the Domestic Value, but not less than \$100.

4. *Commercial Merchandise.*

The fact that undeclared duty-free articles are imported for commercial purposes may be considered an aggravating factor under section II.3. of these guidelines.

III. *Other Applicable Rules.*

1. These guidelines provide a framework and procedure by which violations of 19 U.S.C. 1497 are to be analyzed. They are not mandatory in the sense that they must be absolutely applied. Customs officers varying from these guidelines must provide reasons for doing so in the case record.

2. Customs officers shall document mitigating and aggravating factors found in each case in the case file. There must be a basis shown for mitigated amounts.

3. It is intended that mitigating and aggravating factors shall be considered together and used to offset each other where appropriate.

4. The rate of duty to be used in calculating the mitigated penalty shall be the appropriate rate from Chapters 1-97, HTSUS, and not the flat rate from Chapter 98, HTSUS.

5. "Duty" means Customs duties and any internal revenue taxes which would have attached upon importation (see section 101.1(i), Customs Regulations). Therefore, multiples will also be applied to internal revenue taxes which would have been due.

6. Customs officers may, within their discretion, consider other factors not here delineated as aggravating or mitigating and apply the guidelines accordingly. These additional factors must also be documented in the case file.

7. These guidelines are not authority for admitting into the commerce of the United States articles which are conditionally or absolutely prohibited from entry.

8. The presence of one or more extraordinary aggravating factors, including but not limited to those set forth in section I.6. of these guidelines, may within the discretion of the deciding officer be a basis for denial of relief.

9. If the violator is being prosecuted criminally, the civil (19 U.S.C. 1497) liability generally is administratively settled only after completion of the prosecution or with the express approval of the appropriate U.S. attorney. Criminal prosecution of the violator, however, is insufficient grounds to delay indefinitely determination of the civil liability. The Fines, Penalties, and Forfeitures Officer should contact the Chief Counsel representative in the field to determine the best course of action to follow with respect to the civil liability. Chief Counsel representative will consult with the U.S. attorney and the Penalties Branch at Customs Headquarters.

Because of time delay problems, all *seizures* involving criminal prosecutions must be promptly coordinated in this manner, and consideration should be given to immediate referral of the forfeiture action to the U.S. attorney for the institution of a judicial proceeding.

[T.D. 83-145, 48 FR 30100, June 30, 1983, as amended by T.D. 89-1, 53 FR 51271, Dec. 21, 1988; T.D. 99-27, 64 FR 13676, Mar. 22, 1999]

APPENDIX B TO PART 171—CUSTOMS REGULATIONS, REVISED PENALTY GUIDELINES, 19 U.S.C. 1592

A monetary penalty incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592; hereinafter referred to as section 592) may be remitted or mitigated under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. It is intended that these guidelines shall be applied by Customs officers in pre-penalty proceedings and in determining the monetary penalty assessed in the penalty notice. The assessed or mitigated penalty amount determined in accordance with these guidelines does not limit the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to 19 U.S.C. 1592(e).

(A) *Violations of Section 592; Materiality*

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, a violation of section 592 occurs when a person, through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States by means of any document, written or oral statement, or act which is material and false, or any omission which is material; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means. A document, statement, act, or omission is material if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping, countervailing duty or a similar statute, or an unfair act involving patent or copyright infringement. There is no violation if the falsity or omission is due solely to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negligent conduct.

(B) Degrees of Culpability

There are three degrees of culpability under section 592: negligence, gross negligence, and fraud.

(1) *Negligence*. A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

(2) *Gross Negligence*. A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.

(3) *Fraud*. A violation is determined to be fraudulent if the material false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence.

(C) Assessment of Penalties

(1) *Issuance of Pre-Penalty Notice*. (a) As provided in §162.77, Customs Regulations (19 CFR 162.77), if the port director has reasonable cause to believe that a violation of section 592 has occurred and determines that further proceedings are warranted, he shall issue to each person concerned a notice of his intent to issue a claim for a monetary penalty. In issuing such pre-penalty notice, the port director shall make a tentative determination of the degree of culpability and the amount of the proposed claim. A pre-penalty notice is not required if the violation involves a non-commercial importation or if the proposed claim does not exceed \$1,000.

(b) If the violation is determined to be the result of fraud, the proposed claim shall be equal to the domestic value of the merchandise. In cases involving gross negligence and negligence, in determining the amount of the proposed claim, the port director shall take into account the gravity of the offense, the amount of loss of revenue, the extent of wrongdoing, mitigating, aggravating and extraordinary factors, and other factors bearing upon the seriousness of the violation, but in no case shall the assessed penalty exceed the statutory ceilings prescribed in section 592. In cases involving gross negligence and negligence, penalties equivalent to the ceilings stated in paragraph (D) regarding disposition of cases may be appropriate in cases

involving serious violations, e.g., violations involving a high loss of revenue and quota evasions. To be serious, a violation need not result in a loss of revenue. The violation may be serious because it affects the admissibility of merchandise or the enforcement of other laws, as in the case of quota evasions, false statements to conceal the dumping of merchandise, or violations of exclusionary orders of the International Trade Commission.

(c) Violations where the loss of revenue is nonexistent or minimal and which have an insignificant impact on enforcement of the laws of the United States may justify a proposed penalty in a fixed amount not related to the value of merchandise, but an amount believed sufficient to have a deterrent effect, i.e., violations involving the subsequent sale of merchandise or vehicles entered for personal use; violations involving failure to comply with declaration or entry requirements which do not change the admissibility or entry status of merchandise, its appraised value or classification; violations involving the illegal diversion to domestic use of instruments of international traffic; and local point-to-point traffic violations. This category also includes violations in which the falsity or omission is relevant only to the assessment of duties, but in which it is finally determined that the falsity or omission did not result in any loss of duties, i.e., failure to report commissions paid which are ultimately determined to be non-dutiable; or a false statement as to the relationship of the parties if the fact of the relationship is determined not to affect appraisement. In order for there to be a violation of section 592, the falsity or omission must be material, as defined in paragraph (A) of these guidelines. Generally, a penalty in a fixed amount ranging from \$100 to \$500 would be appropriate in cases where there are no prior violations of the same kind. Fixed sums ranging from \$500 to \$10,000 may be appropriate, however, in the case of multiple or repeated violations. Fixed sum penalty amounts may not exceed the maximum amounts stated in section 592 and in these guidelines.

(d) In determining the amount of the proposed penalty, the port director shall also take into account any mitigating, aggravating, or extraordinary factors that are clearly established by the evidence available at the time.

(2) *Issuance of Penalty Notice*. (a) Following issuance of the pre-penalty notice, and in consideration whether or not to issue a penalty notice pursuant to §162.79, Customs Regulations (19 CFR 162.79), and if so, in what amount, the port director shall give consideration to all available evidence with respect to the existence of material false statements or omissions (including evidence presented by the alleged violator), the degree of culpability, the existence of a prior disclosure, the

seriousness of the violation, and the existence of mitigating, aggravating, or extraordinary factors. In all cases involving fraud, the penalty notice shall be in the amount of the domestic value of the merchandise. In general, the degree of culpability stated in a pre-penalty notice shall not be increased in the penalty notice. If, subsequent to the issuance of a pre-penalty notice and upon further review of the evidence, the port director determines that a higher degree of culpability exists, the pre-penalty notice should be cancelled and a new pre-penalty notice issued indicating the higher degree of culpability and increased penalty amount proposed, with supporting evidence reflected therein. If, however, less than 3 months remain before expiration of the statute of limitations, the higher degree of culpability and higher penalty amount may be indicated in the notice of penalty. Alternatively, the port director shall consider whether a lower degree of culpability is warranted by the evidence. The penalty notice shall contain other changes in the information provided in the pre-penalty notice.

(b) No penalty case shall be initiated for revenue-loss violation, if the port director is certain that the violation has resulted from negligence, the combined actual and potential loss of revenue from entries at that port is \$500 or less, and the circumstances make it certain it is a violation which does not extend to other ports. In cases in which the loss of revenue is between \$500 and \$1,000, the port director may initiate a penalty case if, in his consideration of all the circumstances, the claim for monetary penalty is warranted as a deterrent for future violations. Any actual loss of revenue shall be collected pursuant to § 162.79b, Customs Regulations (19 CFR 162.79b).

(c) No penalty case shall be initiated for a violation involving gross negligence or negligence where a prior disclosure has been made and there is no actual loss of revenue, or where the actual loss of revenue has been tendered to Customs and the interest thereon is less than \$500.

(D) Disposition of Cases

(1) *In General.* In mitigating claims for monetary penalty, the Fines, Penalties, and Forfeitures Officer or appropriate customs official shall consider all the information in the petition and all available evidence, taking into account any mitigating, aggravating, and extraordinary factors in determining the final assessed penalty. All factors used by the Fines, Penalties, and Forfeitures Officer or appropriate customs official in determining the penalty should be stated in this decision. If a penalty in a fixed amount is deemed not to be appropriate (see (C)(1)(c)), disposition in revenue-loss and

non-revenue-loss cases shall proceed in the manner set forth below.

(2) *Violations Determined to be Fraudulent.* Absent extraordinary factors justifying further relief, a penalty for a fraudulent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of five times the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or eight times the loss of revenue. However, a penalty equal to the greater of the domestic value of the merchandise or eight times the loss of revenue may be warranted due to the existence of aggravating factors.

(b) For non-revenue-loss violations, to an amount ranging from 50 to 80 percent of the dutiable value of the merchandise. However, a penalty equal to the domestic value of the merchandise may be warranted due to the existence of aggravating factors.

(3) *Violations Determined to be Grossly Negligent.* Absent extraordinary factors justifying further relief, a penalty for a grossly negligent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of two and one-half times the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or four times the loss of revenue;

(b) For non-revenue-loss violations, to an amount ranging from 25 to 40 percent of the dutiable value of merchandise.

(4) *Violations Determined to be Negligent.* Absent extraordinary factors justifying further relief, a penalty for a negligent violation shall be mitigated as follows:

(a) For revenue-loss violations, to an amount ranging from a minimum of one-half the loss of revenue to a maximum of the lesser of the domestic value of the merchandise or two times the loss of revenue.

(b) For non-revenue-loss violations, to an amount ranging from five to 20 percent of the dutiable value of the merchandise.

(5) *Cancellation of Claim.* The Fines, Penalties, and Forfeitures Officer shall cancel a claim for monetary penalty whenever it is determined that an essential element of the violation has not been established by the available evidence.

(6) *Remission of Claim.* If, following consultation with the Chief Counsel representative in the field, the Fines, Penalties, and Forfeitures Officer determines by clear and convincing evidence that the statute of limitations would be available as a defense to enforcement of a claim for monetary penalty, then the Fines, Penalties, and Forfeitures Officer shall remit such claim, if it is within his authority as provided in § 171.21, Customs Regulations (19 CFR 171.21). Any such case not within the Fines, Penalties, and Forfeitures Officer's authority should be referred to

the Penalties Branch at Customs Headquarters. If the Fines, Penalties, and Forfeitures Officer believes that a claim for monetary penalty should be remitted for a reason not set forth in these guidelines, he shall first obtain approval from the Chief, Penalties Branch, Customs Headquarters.

(E) Prior Disclosure; Disposition of Cases

(1) In non-revenue-loss cases and potential-revenue loss cases involving a prior disclosure where the degree of culpability is determined to be negligence or gross negligence, the claim for monetary penalty is to be remitted in full.

(2) In non-revenue-loss cases involving a prior disclosure where the degree of culpability is determined to be fraud, the claim for monetary penalty shall be equal to ten percent of the dutiable value of the merchandise. There shall be no further mitigation in the absence of extraordinary factors.

(3) In actual-revenue-loss cases involving a prior disclosure where the degree of culpability is determined to be negligence or gross negligence, the claim for monetary penalty shall be equal to the interest computed from the date of liquidation on the amount of the actual loss of revenue resulting from the violation.

(4) In revenue-loss cases involving a prior disclosure where the degree of culpability is determined to be fraud, the claim for monetary penalty shall be equal to 100 percent of the total actual and potential loss of revenue resulting from the violation. There shall be no further mitigation in the absence of extraordinary factors.

(F) Mitigating Factors

The following factors shall be considered in mitigation of the penalty, provided that sufficient evidence establishes their existence. The list is not exclusive.

(1) *Contributory Customs Error.* This factor includes misleading or erroneous advice given by a Customs official only if it appears that the violator reasonably relied upon the information. If the claimed erroneous advice was not given in writing, the violator has the burden of establishing this claim by a preponderance of the evidence. The concepts of comparative negligence may be utilized in determining the weight to be assigned to this factor. If it is determined that the Customs error was the sole cause of the violation, the penalty is to be cancelled. If the Customs error contributed to the violation, but the violator is also culpable, the Customs error is to be considered as a mitigating factor.

(2) *Cooperation with the Investigation.* In order to obtain the benefits of this factor, the violator must exhibit cooperation beyond that expected from a person under investigation for a Customs violation. Some

examples of the cooperation contemplated include assisting Customs officers to an unusual degree in auditing the books and records of the violator, and assisting Customs in obtaining additional information relating to the subject violation or other violations. Merely providing the books and records of the violator may not be considered cooperation justifying mitigation.

(3) *Immediate Remedial action.* This factor includes the payment of the actual loss of duties prior to the issuance of a penalty notice and within 30 days of the determination of the duties owed. In certain extreme circumstances, this factor may include the removal of an offending employee. The correction of organizational or procedural defects will not be considered a mitigating factor. It is expected that any importer or other involved individual will seek to remove or change any condition which contributed to the existence of a violation.

(4) *Inexperience in Importing.* Inexperience is a factor only if it contributes to the violation and the violation is not due to fraud or gross negligence.

(5) *Prior Good Record.* For the violator to benefit from this factor, the violation must have occurred as a result of negligence or gross negligence, and the violator must be able to show a consistent pattern of importations without violation of section 592, or any other statute prohibiting false or fraudulent importation practices.

(G) Aggravating Factors

Certain factors may be determined to be aggravating factors in arriving at the final administrative penalty decision. Examples of aggravating factors include obstructing the investigation, withholding evidence, providing misleading information concerning the violation, transshipment in the case of textiles and textile products affecting a country of origin determination, and prior substantive violations of section 592 for which a final administrative finding of culpability has been made.

(H) Extraordinary Factors Justifying Further Relief

(1) The four factors specified below may be considered in connection with further relief. Such relief may be accorded for extraordinary factors not specified below only upon the concurrence of the Chief, Commercial Fraud and Negligence Penalties Branch, Headquarters.

(a) *Inability to obtain jurisdiction over the violator or inability to enforce a judgement against the violator.*

(b) *Inability to Pay the Mitigated Penalty.* The party claiming the existence of this factor must present documentary evidence in

support thereof, i.e., copies of income tax returns, current financial statements, and independent audit reports.

(c) *Extraordinary Expenses.* This factor may include such expenses as those incurred in providing one-time computer runs solely for submission to Customs to aid it in analyzing a case involving an unusual number of entries, with each entry involving several factors, i.e., violations involving subheading 9802.00.80, Harmonized Tariff Schedule of the United States. Usual accounting and legal expenses (both general and Customs), or the cost incurred in instituting remedial action would not be considered extraordinary expenses.

(d) *Customs Knowledge.* Additional relief in non-fraud cases will be granted if it is determined that Customs had actual knowledge of a violation and failed to inform the violator so that it could have taken earlier corrective action. In such cases, if a penalty is to be assessed involving repeated violations of the same kind, the maximum penalty amount for violations occurring after the date on which actual knowledge was obtained by Customs will be limited to two times the loss of revenue in revenue-loss cases or five percent of dutiable value in non-revenue-loss cases if the continuing violations were the result of gross negligence, or the lesser of one time the loss of revenue in revenue-loss cases or two percent of dutiable value in non-revenue-loss cases if the violations were the result of negligence. This factor shall not be applicable when a substantial delay in the investigation is attributable to the violator.

(I) *Customhouse Brokers*

A customhouse broker shall be subject to the above guidelines only if he is determined to have (1) committed a fraudulent or grossly negligent violation; or (2) committed a grossly negligent or negligent violation and shared in the financial benefits of the violation to an extent over and above the prevailing brokerage fees.

If the broker committed a grossly negligent violation without sharing in the financial benefits over and above the prevailing brokerage fees, the penalty should ordinarily be mitigated to a flat sum which should not exceed \$500.

If the broker committed a negligent violation without sharing in the financial benefits over and above the prevailing brokerage fees, the penalty should ordinarily be mitigated to a flat sum not to exceed \$250. A broker is not negligent if he acts with reasonable care (as measured by the prevailing standards of the profession) in the preparation and presentation of the entry or the entry summary, and reasonably relies on the information or

documents supplied to him by the actual owner, consignee, shipper, or their agent.

(J) *Arriving Travelers*

(1) *Liability.* Assessment of penalties and determination of degrees of culpability for violations by an arriving traveler must be determined in accordance with the above guidelines.

(2) *Limitations on Liability.* (a) In the absence of a referral for criminal prosecution, monetary penalties assessed in the case of a first-offense, non-commercial, fraudulent violation by an arriving traveler will generally be limited: (1) In the case of revenue-loss violations, to an amount ranging from a minimum of three times the loss of revenue to a maximum of five times the loss of revenue, provided the loss of revenue is also paid; (2) in the case of non-revenue-loss violations, to an amount ranging from a minimum of 30 percent of the dutiable value to a maximum of 50 percent of the dutiable value.

(b) With respect to revenue-loss violations, no penalty case shall be initiated against an arriving traveler if the violation is not fraudulent or commercial, the loss of revenue is \$100 or less, and there are no other concurrent or prior violations of section 592 or other statutes prohibiting false or fraudulent importation practices. However, all lawful duties shall be collected. With respect to non-revenue-loss violations, no penalty case shall be initiated against an arriving traveler if the violation is not fraudulent or commercial, there are no other concurrent or prior violations of section 592, and a penalty is not believed necessary to deter future violations or to serve a law enforcement purpose.

(K) *Violations of Laws Administered by Other Federal Agencies*

Violations of laws administered by other federal agencies (such as Foreign Assets Control, Agriculture, Fish and Wildlife) should be referred to the appropriate agency for its recommendation. Such recommendation, if promptly tendered, will be given due consideration, and may be followed provided the recommendation would not result in a disposition inconsistent with these guidelines.

[T.D. 84-18, 49 FR 1681, Jan. 13, 1984; 49 FR 3986, Feb. 1, 1984, as amended by T.D. 89-1, 53 FR 51271, Dec. 21, 1988; T.D. 89-83, 54 FR 36962, Sept. 6, 1989; T.D. 94-29, 59 FR 14746, Mar. 30, 1994; T.D. 99-27, 64 FR 13676, Mar. 22, 1999]

APPENDIX C TO PART 171—CUSTOMS REGULATIONS GUIDELINES FOR THE IMPOSITION AND MITIGATION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1641

The Trade and Tariff Act of 1984 promulgated numerous changes to the current statute relating to Customs brokers. The following document attempts to define that conduct which is to be proscribed and to suggest penalty amounts to be assessed for such violations. It also chronicles procedures to be followed in assessment and mitigation of penalties.

NOTE: Assessment of a monetary penalty is an alternative sanction to revocation or suspension of the broker's license or permit.

I. PENALTY ASSESSMENT PROCEDURES—19 CFR PART 111, SUBPART E

A. When a penalty against a broker is contemplated, the "appropriate Customs officer", (i.e., the Fines, Penalties, and Forfeitures Officer) shall issue a written notice which advises the violator of the allegations which would warrant imposition of a penalty. The written notice shall be in a format similar to a prepenalty notice that would be issued in contemplation of assessment of a penalty under section 1592 or 1584.

B. The written notice shall inform the violator that he has 30 days to respond as to why a penalty should not be issued. See 19 CFR 111.92.

C. If no response is received from the violator, or, if after receipt of the response, it is determined that the penalty should be issued as stated in the prepenalty notice, a notice of penalty CF-5955A shall be issued formally assessing a monetary penalty against the broker.

D. The Fines, Penalties, and Forfeitures Officer may reduce the amount of the contemplated penalty or cancel its issuance altogether if, after review of the violator's submission in response to the prepenalty notice, he is satisfied that the acts which are the basis for the penalty did not occur as charged or occurred in a manner that would permit a reduction in the contemplated penalty.

NOTE: If the penalty requires approval of the Chief, Penalties Branch, Customs Headquarters, and the Fines, Penalties, and Forfeitures Officer wishes to reduce the penalty amount, approval from Headquarters must be obtained.

E. Any notice which contemplates issuance of a penalty of more than \$10,000 must be submitted to the Broker's Compliance Branch, Office of Trade Compliance, for forwarding to the Director, International Trade Compliance Division, for approval prior to issuance. See 19 CFR 111.92.

F. After issuance of a penalty notice, the petitioning provisions of part 171 of the Customs Regulations are in effect.

G. Notwithstanding the provisions of §171.21 of the Regulations (19 CFR 171.21) all petitions for relief in broker penalty cases in which the amount assessed exceeds \$10,000 shall be forwarded to Headquarters, Penalties Branch, for decision. For purposes of §111.94 of the Regulations (19 CFR 111.94), the appropriate Customs officer in cases of over \$10,000 shall be the Chief, Penalties Branch, Customs Headquarters. In cases where a penalty has been assessed for \$10,000 or less, the appropriate Customs officer is the Fines, Penalties, and Forfeitures Officer.

H. Supplemental petitions, see 19 CFR 111.95.

NOTE: The deciding official may, as a matter of discretion, accept a supplemental petition despite the final mitigation offered to a petitioner of \$1,000 or less.

I. If the broker does not comply with a final mitigation decision within 60 days, the matter shall be referred to the Department of Justice for commencement of judicial action.

II. PENALTY ASSESSMENT—CONDUCTING CUSTOMS BUSINESS WITHOUT A LICENSE (19 U.S.C. 1641(B)(6))

A. No person may conduct Customs business, other than solely on behalf of that person, without a broker's license.

B. Penalty amount:

1. The maximum penalty for any one incident of conducting Customs business without a license is \$10,000.

2. Total aggregate penalties for violation of this or any other section of the broker penalty statute is \$30,000. As a general rule, \$10,000 will be the maximum assessment for a violation solely involving conducting Customs business without a license, without regard to the frequency of violations. In particularly aggravated circumstances, this rule shall be suspended.

C. Customs business includes:

1. Classification and valuation.

2. Payment of duties, taxes or other charges.

3. Drawback or refund of duties.

4. Filing of entries or other documents relating to issues covered by 1–3.

D. Customs business does not include:

1. Marine transactions.

2. In-bond movement or transportation of merchandise.

3. Foreign Trade Zone admissions. See C.S.D. 84–23.

E. Penalty amounts to be imposed for transacting Customs business without a license are as follows:

1. No penalty action when importation is conducted on behalf of a family member. For

purposes of this subsection, "family member" is defined as a parent, child, spouse, sibling, grandparent or grandchild.

2. No penalty action against an individual who has a power of attorney to act as an unpaid agent on a non-commercial shipment. See 19 CFR 141.33.

3. A \$250 penalty for:

a. First violation when transaction is non-commercial but is conducted on behalf of any business entity, or

b. First violation where the importation is commercial in nature (i.e., imported merchandise is for resale) or where the violator is compensated for his action, e.g., an importation of raw material or parts of merchandise that is to be manufactured, refined or assembled here before resale would be a commercial entry because the merchandise eventually would be resold, albeit in another form than that which it was entered.

4. A \$1,000 penalty for repeat violation involving:

a. Commercial importation.

b. Non-commercial importation made on behalf of a business entity.

c. Non-commercial importation for which compensation is received by the violator.

5. A \$10,000 penalty when:

a. Violator falsely holds himself out as being a licensed Customs broker.

b. A continuing course of conduct can be shown (determined by frequency of violations or number of entries involved) which would indicate that the violator is entering merchandise for others on a regular commercial basis, e.g., if the violator has incurred numerous penalties under subsections (3) and (4) above, but the smaller penalties have had no deterrent effect, the \$10,000 penalty under this subsection should be assessed in an action separate from those smaller penalties.

F. Mitigation—No mitigation will be afforded for any violation involving conducting Customs business without a license unless the violator can show an inability to pay such penalty.

G. IMPORTANT: As a general rule, a separate penalty should not be imposed for each unlawful Customs business transaction if numerous transactions occur contemporaneously. For example:

1. If an unlicensed individual files six commercial entries at one time, that should be treated as one violation. It should not be treated as six violations because the entries were presented contemporaneously.

2. If Customs discovers that an individual has conducted Customs business without a license on numerous occasions, but such individual acted without knowledge of the prohibition on such conduct, those numerous transactions should be treated as one violation for purposes of imposition of any penalty.

H. NOTE: Conducting Customs business without a license is not the same violation

as conducting Customs business without a permit. The latter violation is discussed later in this appendix in the section involving Violation of Other Laws or Regulations Enforced by Customs.

I. Intent to violate the law is not an element of this violation. Reference to "intentionally transacts Customs business" in subsection 1641(b)(6) relates to the intentional transaction of the business itself, not to any intentional attempt to violate the terms of the statute.

III. SECTION 1641(D)(1)(A)—MAKING A FALSE OR MISLEADING STATEMENT OR AN OMISSION AS TO MATERIAL FACT WHICH WAS REQUIRED TO BE STATED IN ANY APPLICATION FOR A LICENSE OR PERMIT

A. If the license would not have been issued but for the false statement, the proper sanction would be suspension or revocation of the license. If the false or misleading statement would not have absolutely resulted in the denial, revocation or suspension of a license, then penalty sanctions are proper.

B. Material facts include but are not limited to:

1. Facts as to identity.

2. Facts as to citizenship status of an individual.

3. Facts as to moral character of an individual which relate to his fitness to conduct Customs business.

4. The organization of any corporation, association or partnership.

5. The status of the license of a license holder who is a corporate officer or partner.

C. Penalty Amount—\$5,000 for each false statement, to a maximum of \$30,000.

D. Examples of situations where revocation of the license is appropriate.

1. An applicant states that he is 21 years old (as required by 19 CFR 111.11) and he is not. But for the false statement, the applicant could not meet the age requirement for a license.

2. An applicant provides an alias in the application which is a material false statement as to identity.

E. Mitigation guidelines.

1. Violation due to clerical error (clerical error as defined by 19 U.S.C. 1520(c)(1)), mitigated without payment.

2. Violation due to negligence.

a. This is defined as more than clerical error, but not an intentional violation. Examples include:

i. Failing to list a new corporate office because corporate records have not been kept current.

ii. Listing an incorrect address for a reference because applicant has failed to update his records.

b. Mitigate to \$500 for each \$5,000 penalty assessed.

c. This category excludes cases of harmless error, i.e., a mistake which could not possibly harm the government's interests. Cases falling in this category should be mitigated in full.

3. Intentional violations—Revocation of a license which has been granted is the preferred sanction. If no license has been granted, no mitigation.

IV. SECTION 1641(D)(1)(B)—BROKER CONVICTED OF CERTAIN FELONIES OR MISDEMEANORS SUBSEQUENT TO FILING LICENSE APPLICATION

A. As a general rule, license revocation is the standard sanction for these violations. If the conviction occurs subsequent to the filing of an application, monetary penalties may be assessed according to the following criteria.

B. Unlawful conduct must relate to:

1. Importation or exportation of merchandise.

2. Conduct of Customs business (this shall include violations relating to taxes and duties and documents required to be filed with regard to such taxes and duties).

3. Relevant convictions would include:

a. 18 U.S.C. 1001—making a false statement to Customs or any other agency with regard to any relevant transaction.

b. 18 U.S.C. 545—unlawful importation of merchandise.

c. 18 U.S.C. 542—unlawful importation by means of a fraudulent act or omission.

d. 22 U.S.C. 2778—illegal exportation of munitions.

C. Monetary penalties may not be imposed in connection with convictions relating to conduct described in subsection 1641(d)(1)(B)(iii) including larceny, theft, robbery, extortion, counterfeiting, fraudulent concealment or conversion, embezzlement or misappropriation of funds. Either suspension or revocation is the appropriate penalty for these infractions.

D. Penalty amounts.

1. \$15,000 for a misdemeanor conviction.

2. \$30,000 for a felony conviction.

E. Mitigation.

1. For a misdemeanor conviction, mitigation to a lesser amount is permitted if the conviction related to Customs business and the domestic value of the merchandise involved is less than \$15,000. In such case, mitigation to an amount equal to the domestic value of the merchandise is appropriate.

2. For other misdemeanor convictions, no relief.

3. Felony convictions, no relief.

V. SECTION 1641(D)(1)(C)—VIOLATION OF ANY LAW ENFORCED BY THE CUSTOMS SERVICE OR THE RULES OR REGULATIONS ISSUED UNDER ANY SUCH PROVISION

A. Penalties under this section may be imposed in addition to any penalty provided for under the law enforced by Customs. *Exception:* Penalties imposed against a broker under 19 U.S.C. 1592 at a culpability level of less than fraud or under 19 U.S.C. 1595a(b) shall not be imposed in addition to a broker's penalty.

B. Additional penalties under this section shall also be imposed against any broker where the other statute violated only moves against property, or the violator has demonstrated a continuing course of illegal conduct or evidence exists which indicates repeated violations of other statutes or regulations.

C. Conducting Customs business without a permit penalties should be assessed under this section.

1. The penalty notice should also cite 19 CFR 111.19 as the regulation violated. A party operating without a permit is required to apply for one under the above-noted regulation.

2. Assessment amount—\$1,000 per transaction conducted without a permit.

3. Mitigation.

a. Negligence, mitigate to \$250–\$500 per transaction depending on the presence of mitigating factors (lack of knowledge of permit requirement).

b. Intentional, grant no relief.

c. No mitigation if permit revoked by operation of law.

4. Generally, a separate penalty should not be assessed for each non-permitted transaction if numerous transactions occurred contemporaneously. For example, if a broker files 30 entries the day after a permit expires, the 30 filings should be treated as one violation, not 30 separate violations.

D. Penalties for failure to exercise due diligence in payment, refund or deposit of monies received from clients in connection with clients' Customs business also should be assessed under this section. This includes failure to pay over to a client, or file a written statement to a client accounting for, funds received.

1. The penalty notice should also cite 19 CFR 111.29 as the regulation violated.

2. Assessment amount—an amount equal to the value of any monies up to a maximum of \$30,000, to be deposited with Customs or refunded or accounted for to a client.

3. No mitigation shall be afforded until the monies are properly paid to Customs or refunded or accounted for to the clients.

4. If any claims for liquidated damages result against the client's bond from the failure to pay monies to Customs, no mitigation from the penalty shall be granted until the claim for liquidated damages is settled *by the violating broker* either through payment of the full claim or a mitigated amount.

5. After monies are paid or accounted for and/or liquidated damages claims are settled as stated in 3. and 4. above, mitigation may be afforded. If the violator is found to be negligent, the penalty may be mitigated to an amount between 25 and 50 percent of the assessed amount, but no lower than \$250. No mitigation from an intentional violation.

E. Penalties for failure to retain powers of attorney from clients to act in their names.

1. The penalty notice should also cite 19 CFR 141.46 as the regulation violated.

2. Assessment amount—\$1,000 for each power of attorney not on file.

3. Mitigation—for a first offense, mitigate to an amount between \$250 and \$500 unless extraordinary mitigating factors are present, in which case full mitigation should be afforded. An extraordinary mitigating factor would be a fire, theft or other destruction of records beyond broker control. Subsequent offenses—no mitigation unless extraordinary mitigating factors are present.

4. Penalty should be mitigated in full if it can be established that a valid power of attorney had been issued to the broker, but it was misplaced or destroyed through clerical error or mistake.

F. If the other statute violated moves only against property, the violator shall incur a monetary penalty equal to the domestic value of such property or \$30,000, whichever is less.

e.g., Violation of 22 U.S.C. 401 for unlawful exportation of merchandise results in seizure and forfeiture of the violative merchandise. There are no penalty provisions which Customs enforces against parties responsible for the seizable offense. If brokers are recalcitrant and are constantly responsible for offenses which result in seizure of merchandise, a penalty equal to the domestic value of such merchandise (in no case to exceed \$30,000) should be imposed.

G. Use of a broker's importation bond to aid an importer who has had his immediate delivery privileges revoked.

1. The broker has aided his client in avoiding the immediate delivery sanctions. The penalty notice should cite 19 CFR 142.25(c) as the regulation violated. Before assessment of this penalty, the broker should be shown to have known or been negligent in not knowing of the client's sanction.

2. A penalty equal to the value of the merchandise, not to exceed \$30,000, should be assessed.

3. Mitigation—The penalty shall be mitigated to an amount between 25 and 50 percent of that assessed for a first violation

where negligence is shown. Any knowing violation or a subsequent negligent violation (not necessarily involving the same client) will result in no mitigation.

H. If the other statute violated provides for a personal penalty, the violator shall incur an additional monetary penalty under this section equal to such personal penalty or \$30,000, whichever is less.

I. Penalties assessed under this provision are not limited to violations just involving Customs business as defined in the statute.

J. Mitigation guidelines.

1. If the other law violated moves only against property, mitigate the penalty using guidelines in effect for the other statute violated. For example, if the broker is responsible for a 401 seizure of merchandise valued at \$45,000, he incurs a penalty of \$30,000. The guidelines for remission of the 401 forfeiture are applicable to mitigation of the broker penalty. Thus, if the forfeiture is remitted upon payment of 5 percent of the merchandise's value, the penalty will be mitigated upon payment of a like amount.

2. If the other law violated provides for a personal penalty, mitigate the broker penalty using guidelines in effect for the other statute violated.

For example, a broker incurs a \$40,000 penalty under 1592. The penalty amount represents eight times the loss of revenue because a preliminary finding of fraud is made (see section V.A. of this appendix). A penalty of \$30,000, in addition to the \$40,000 penalty issued under 1592, may be assessed. The 1592 penalty is later mitigated to \$25,000, an amount equal to five times the loss of revenue, as the finding of fraud is upheld and it is also determined that the broker shared in the financial benefits of the violation. The broker penalty also should be mitigated to that \$25,000 figure, for a total collection of \$50,000.

VI. SECTION 1641(D)(1)(D)—COUNSELING, COMMANDING, INDUCING, PROCURING OR KNOWINGLY AIDING AND ABETTING VIOLATIONS BY ANY OTHER PERSON OF ANY LAW ENFORCED BY THE CUSTOMS SERVICE

A. If the law violated by another moves only against property, a monetary penalty equal to the domestic value of such property or \$30,000 whichever is less, may be imposed against the broker who counsels, commands or knowingly aids and abets such violation.

B. If the law violated provides for only a personal penalty against the actual violator, a penalty may be imposed against the broker in an amount equal to that assessed against the violator, but in no case can the penalty exceed \$30,000.

C. If the broker is assessed a penalty under the statute violated by the other person, he may be assessed a penalty under this section in addition to any other penalties.

D. Examples of violations of this subsection:

1. A broker counsels a client that certain gemstones are absolutely free of duty and need not be declared upon entry into the United States. The client arrives in the United States and fails to declare a quantity of gemstones worth \$45,000. A penalty of \$30,000 may be imposed against the broker for such counseling. The client would incur a personal penalty of \$45,000 under the provisions of title 19, United States Code, section 1497, but the penalty against the broker cannot exceed \$30,000.

2. A client imports \$15,000 worth of merchandise by vessel. The merchandise is unladen at the wharf but Customs has not appraised or released it. Customs informs the broker that the shipment must be held for an intensive examination. The broker informs the client that the merchandise can be moved and delivered to the consignee. The broker assures his client that he will handle all the necessary paperwork. The merchandise is moved from the wharf. The broker is subject to a \$15,000 penalty for counseling and inducing his client to violate the provisions of title 19, United States Code, section 1448 and title 19, United States Code, section 1595a(b).

E. Mitigation—Follow guidelines applicable to the other penalty or forfeiture statute involved.

VII. SECTION 1641(D)(1)(E)—KNOWINGLY EMPLOYING OR CONTINUING TO EMPLOY ANY PERSON WHO HAS BEEN CONVICTED OF A FELONY, WITHOUT WRITTEN APPROVAL OF SUCH EMPLOYMENT FROM THE SECRETARY OF THE TREASURY

A. A broker has 30 days to seek approval of the Secretary for such employment. If he seeks the approval within such time, no penalty will be assessed.

B. A \$5,000 penalty for knowingly employing any convicted felon and failing to make application with the Secretary approving such employment within 30 days of the date of discovery of the felony conviction.

C. A \$25,000 penalty for knowingly employing any convicted felon without seeking approval for employment.

D. A \$30,000 penalty for knowingly employing any convicted felon and continuing to employ same after approval has been denied (generally revocation or suspension of the license would be appropriate under this circumstance).

E. *Example:* If a broker unknowingly employs a convicted felon and 1 year after employment discovers the existence of such a conviction, the following actions would dictate imposition of a penalty:

1. If he seeks approval of the Secretary within 30 days after discovery of the existence of the conviction, no penalty will be assessed.

2. If he seeks approval at some time after 30 days from the date of discovery, a \$5,000 penalty would lie.

3. If he does not seek approval until after Customs becomes aware of the violation, a \$25,000 penalty would lie.

4. If he seeks approval, but is denied, and continues to employ the convicted felon, a \$30,000 penalty would lie.

F. Customs discovery of a felony conviction. If Customs discovers the felony conviction and there is no indication that the employer is aware of same, Customs may inform the employer of such conviction. Discretion should be used in divulging this information.

G. Mitigation will only be permitted from the \$5,000 penalty as follows:

1. If the application for approval is submitted within 60 days, but after 30 days, mitigate to \$2,000.

2. If there is no application beyond the 60-day period, no mitigation shall be granted. Continued employment will result in further penalties as described above in sections E.3 and E.4.

VIII. SECTION 1641(D)(1)(F)—IN THE COURSE OF CUSTOMS BUSINESS, WITH INTENT TO DEFRAUD, KNOWINGLY DECEIVING, MISLEADING OR THREATENING ANY CLIENT OR PROSPECTIVE CLIENT

A. An unsubstantiated accusation by a client is inadequate basis to assess any penalty under this section of law.

B. A \$30,000 penalty should be imposed for any violation of this section.

C. Mitigation—Inasmuch as evidence of intent must be shown before a penalty can be imposed, no mitigation should be permitted if a violation is found to lie. A petition for mitigation could be entertained only on the issue of whether such violation did, in fact, occur.

IX. SECTION 1641(B)(5)—THE FAILURE OF A CUSTOMS BROKER THAT IS LICENSED AS A CORPORATION, ASSOCIATION OR PARTNERSHIP TO HAVE, FOR ANY CONTINUOUS PERIOD OF 120 DAYS, AT LEAST ONE OFFICER OF THE CORPORATION OR ASSOCIATION OR ONE MEMBER OF THE PARTNERSHIP VALIDLY LICENSED

A. *Important:* Violation of this section results in the revocation of the broker's license by operation of law.

B. A \$10,000 penalty may be imposed pursuant to section 1641(b)(6) because the revocation by operation of law results in the broker conducting Customs business without a license. No penalty liability would be incurred specifically under section 1641(b)(5).

C. Mitigation—Grant no mitigation from any penalty incurred by a broker for conducting Customs business without a license as a result of revocation of that license by operation of law.

X. SECTION 1641(C)(3)—FAILURE OF A CUSTOMS BROKER GRANTED A PERMIT TO CONDUCT BUSINESS IN A CERTAIN DISTRICT TO EMPLOY, FOR A CONTINUOUS PERIOD OF 180 DAYS, AT LEAST ONE INDIVIDUAL WHO IS LICENSED WITHIN THE DISTRICT OR REGION

A. *Important:* Violation of this section results in the revocation of a permit by operation of law.

B. Penalties may be imposed for violation of the provisions of 1641(d)(1)(C), violation of other laws enforced by Customs. Guidelines for imposition of penalties for conducting Customs business without a permit should be followed.

C. Mitigation—No mitigation should be permitted from any penalty imposed for failure to have a permit when the permit lapses by operation of law.

XI. SECTION 1641(B)(4)—FAILURE OF A LICENSED BROKER TO EXERCISE RESPONSIBLE SUPERVISION AND CONTROL OVER THE CUSTOMS BUSINESS THAT IT CONDUCTS

A. Standards of responsible supervision and control shall be issued by the Commissioner of Customs. Statutory authority to set such standards is provided by section 1641(f).

NOTE: All penalties assessed for violation of 1641(b)(4) shall also cite section 1641(d)(1)(C) as the statute violated in all notices issued to the alleged violator.

B. The following penalty amounts shall be assessed against brokers who fail to exercise responsible supervision and control over business conducted at district level.

1. A penalty of \$1,000 against any broker who:

a. Continuously makes the same errors on a particular type of entry;

b. Fails to properly instruct employees about Customs business, thereby resulting in the filing of incorrect entries or the mishandling of transactions relating to Customs business;

c. Knowingly allows his entry bond to be used to effect release of merchandise in districts where he does not have a license or permit (this is imposed in addition to any penalty for conducting Customs business without a license);

d. Fails to comply with regulations or procedures but does not commit violations that would warrant any higher penalty amount as described below.

2. A penalty of \$5,000 against any broker who, when requested, is unable to produce documents relating to specific Customs business which are material to that business (e.g., if the business regards an entry he should have the invoice, packing list, etc.). This requirement excludes documents not required to be kept by a broker.

3. A penalty of \$5,000 against any broker who is unable to satisfy the deciding Customs official that he has a working knowledge of any operation material to his ability to render valuable service to others in the conduct of Customs business.

Examples include:

a. A working knowledge of all automated systems in use in the district;

b. A knowledge of the cash flow procedures in each district of operation;

c. Retention of copies of all surety bonds in proper form and in sufficient dollar amount;

d. Knowledge of filing systems and document record storage in each district;

e. Continuous monitoring to ensure timely payment of all obligations including duties, taxes and refunds.

4. A penalty of \$5,000 against any broker who fails to exercise responsible supervision and control over the Customs business that it conducts as defined in section XI.C. of this appendix.

5. A penalty of \$10,000 against any broker who is found to have failed to maintain satisfactory accounting records or records of documents filed with Customs on any matter.

C. The following factors shall be indicative of a lack of supervision or lack of working knowledge of Customs procedures (the list is not conclusive):

1. A high rate of entry rejections when compared with other brokers in the permitted district.

2. A high rate of late filing liquidated damages cases when compared with other brokers in the permitted district.

3. In the case of entry summaries filed in the broker's name, a high number of missing document cases when compared with other brokers in the permitted district.

4. An inordinate number of entries for which free entry is claimed, but no documentation supporting such claim is submitted, resulting in liquidation of the entries as dutiable.

5. Inability to assist or failure to cooperate with an audit, including failure to provide all records and any other necessary information pertaining to a broker's Customs business to assist auditors.

6. Failure to settle (including petitioning) liquidated damages claims in a timely manner.

7. Evidence to indicate that timely duty refunds to clients are not made or accounted for and adequate records of same are not kept (usually will result in penalty assessed in accordance with section B.5. above).

8. Employing a licensed individual for a minimal number of days each 120- or 180-day period (see sections 1641(b)(5) and 1641(c)(3) so as to avoid violation of the statute.

a. For purposes of imposition of penalties under this subsection, a minimal number of days shall be 10 working days for each 120-

day period or 15 working days for each 180-day period.

b. It shall be presumed that temporary employment of such a licensed individual is undertaken solely to avoid revocation of a license or permit. Such minimal employment shall be *prima facie* evidence of lack of supervision.

D. Mitigation.

1. \$1,000 penalties shall not be mitigated unless the broker can show that extraordinary mitigating factors are present.

2. \$5,000 penalties for failure to produce documents may be mitigated to an amount between \$2,000 and \$3,500 if the documents are produced but not in a timely fashion. No mitigation shall be afforded if the documents are not produced, unless the broker can satisfactorily demonstrate that such failure to produce was caused by circumstances beyond the control of the broker or his client (e.g., a rupture of relations with the party responsible for generating the documents). Full mitigation shall be afforded in the case of destruction of records by events beyond a broker's control, such as theft, flood, fire or other acts of God.

3. \$5,000 penalty for failure to have a working knowledge of any operation for which a broker is licensed to do business may be mitigated to a lesser amount upon a showing by the broker that steps have been taken to improve instruction and supervision of employees and an improvement in the knowledge of his operation occurs.

4. \$5,000 penalty for failure to exercise responsible supervision and control may be mitigated to a lesser amount if the broker immediately corrects the problem which was the basis for the assessment and sufficiently monitors the situation to avoid recurrence.

5. \$10,000 penalty for failure to maintain satisfactory accounting records will only be subject to mitigation in full if the broker can prove that satisfactory accounting records and documents records are being kept. Mitigation in a lesser degree may be afforded upon a showing by the broker that a *bona fide* attempt was made to establish a satisfactory accounting and/or record-keeping system, or upgrade a deficient system, but such efforts proved unsuccessful or only partially effective.

6. Penalty equal to the value of monies not properly paid or accounted for.

a. If the broker shows that the monies were paid or accounted for and requisite notifications were made, albeit in an untimely fashion not to exceed 30 days after any due date, the penalty may be mitigated upon payment of 25 percent of the assessed amount, but no less than \$250.

b. If the monies were paid and notifications made more than 30 days after any due date, the penalty may be mitigated upon payment of 50 percent of the assessed amount, but not less than \$1,000.

c. If there is no proof of proper payment of duties, refunds, etc., no mitigation shall be granted.

XII. LIMITS OF PENALTY ASSESSMENTS

A. A broker shall be penalized a maximum of \$30,000 for any violation or violations of the statute in any one penalty notice.

B. If a broker is penalized to the maximum the statute will allow and continues to commit the same violation or violations, revocation or suspension of his license would be the appropriate sanction. Barring such revocation or suspension action, he may again be penalized to the maximum the statute will allow.

C. From any one audit, the maximum aggregate penalty for all violations discovered is \$30,000.

XIII. CONSOLIDATION OF CASES

Whenever multiple penalties arising from a particular fact situation or pattern are contemplated against brokers or individuals operating in different districts, the cases may be consolidated in one district. Approval for consolidation must be sought from the Brokers Compliance Branch, Office of Trade Compliance at Headquarters.

[T.D. 90-20, 55 FR 10056, Mar. 19, 1990, as amended by T.D. 97-82, 62 FR 51771, Oct. 3, 1997; T.D. 99-27, 64 FR 13676, Mar. 22, 1999]

PART 172—LIQUIDATED DAMAGES

Sec.

172.0 Scope.

Subpart A—General Provisions

172.1 Notice of liquidated damages incurred and right to petition for relief.

172.2 Failure to petition for relief.

Subpart B—Application for Relief

172.11 Petition for relief.

172.12 Filing of petition for relief.

Subpart C—Action on Petitions

172.21 Petitions acted on by Fines, Penalties, and Forfeitures Officer.

172.22 Special cases acted on by Fines, Penalties, and Forfeiture Officer.

172.23 Limitations on consideration of petitions.

Subpart D—Disposition of Petitions

172.31 Act or omission did not occur.

172.32 Limitation on time decision effective.

172.33 Supplemental petitions for relief.

AUTHORITY: 19 U.S.C. 66, 1623, 1624.